FTR Now

Countdown to ORPP: Ontario Tables New Implementation Legislation

Date: April 18, 2016

Long-awaited Ontario Retirement Pension Plan (ORPP) legislation was introduced on Thursday, April 14, 2016, which, if passed in its present form, will provide the statutory framework and timeline for full ORPP implementation by January 1, 2020. As widely expected, Bill 186, the *Ontario Retirement Pension Plan Act (Strengthening Retirement Security for Ontarians), 2016* (*ORPP Act, 2016*), enshrines various technical design details that were previously announced by the government. In addition, however, the *ORPP Act, 2016* provides a number of important clarifications to address key outstanding issues.

In this *FTR Now*, we highlight new features and aspects of this proposed legislation that are of interest to pension plan administrators, employers and human resources professionals, including:

- The scope of coverage for mandatory participation and prescribed exemptions, including exemptions for certain federal government employees and foreign pension plans
- Employer contribution maximums, pensionable earnings limits and funding parameters
- Benefit details
- Enforcement and penalties
- Transition matters, including implementation dates for large, medium and small employers.

Background on the ORPP Initiative

As we previously reported, the Ontario government first announced the ORPP in its 2014 Ontario Budget. Following the release of a consultation paper and the completion of a public consultation process centred on outstanding design issues and questions, the government provided the first set of design details on August 11, 2015. Additional ORPP details were announced on January 26, 2016, providing much needed clarity on key design issues. The announcement and a corresponding Technical Bulletin supplemented the ORPP framework set out in the *Ontario Retirement Pension Plan Act, 2015* and in prior government communications.

Recently, the government announced that the first ORPP implementation wave would be delayed until January 1, 2018, in part to allow it and the new federal government to continue discussions about cooperation on the ORPP and a possible expansion of the Canada Pension Plan, among other matters.

With the introduction of the much anticipated *ORPP Act, 2016*, the Ontario government is seeking to formalize this significant retirement system reform initiative.

Set out below are key highlights of the proposed legislation.

1. Scope of Coverage

The *ORPP Act, 2016* confirms the type of Ontario employment covered by the ORPP, as well as rules for optional participation and various exemptions that we previously reviewed in our January 28, 2016 *FTR Now*, Ontario Government Announces Additional ORPP Design Details. In general, unless an exemption applies, the ORPP will be mandatory for employers of workers who are considered to be employed in Ontario, are aged 18 through 70, and have annual earnings which exceed $3,500. However, as described below, the *ORPP Act, 2016* provides some additional details and clarifications

on these scope of coverage issues.

Office Holders

The *ORPP Act, 2016* clarifies that corporate directors, holders of judicial office and persons who hold elected positions or who are appointed in a representative capacity will be required to participate in the ORPP unless an exemption otherwise applies.

Self-Employed

Consistent with prior announcements, the *ORPP Act, 2016* does not extend ORPP coverage to the self-employed. On the other hand, coverage for the self-employed is identified as something that could be addressed by way of regulation, provided that such coverage would not result in the registration of the ORPP becoming revocable under the *Income Tax Act* (Canada) (ITA). This suggests some potential for ORPP coverage to be extended to the self-employed if supporting amendments to the ITA are introduced.

Federally Regulated Worker Exemption

Persons who are employed with the federal government are expressly excluded from participation in the ORPP. A judge appointed by the Governor General, a member of the senate or House of Commons, the Governor General, or Lieutenant Governor, or an employee in the office of any of those officials are also excluded.

While the *ORPP Act, 2016* does not expressly exclude other federally regulated employment from the ORPP, it provides generally for other employment to be included or excluded by way of regulation. As we previously reported, the Ontario government will be engaging in further discussions with the federal government on the application of the ORPP to federally regulated employees. The Regulations may be where the agreed upon treatment of other federally regulated employment would be reflected.

Comparable Workplace Pension Plan Exemption

The *ORPP Act, 2016* confirms that employees (and, as discussed above, office holders) who participate in a comparable workplace pension plan, and their employers, will not be required to contribute to the ORPP in respect of that employment. In this regard, the “comparability” thresholds have been established at levels consistent with previous announcements. Specifically:

- A defined benefit (DB) workplace pension plan must have an annual accrual rate of at least 0.5% of “annual remuneration”
- A defined contribution (DC) workplace pension plan must have an annual required contribution rate of at least 8% of “annual remuneration,” with a minimum required employer contribution rate of 4%
- A hybrid/combination workplace pension plan must have benefits/contributions equivalent to a combination of the DB and DC thresholds
- A multi-employer pension plan must satisfy the DB or DC threshold.

The *ORPP Act, 2016* allows for regulations to provide for the above comparable workplace pension plan exemption to be determined on the basis of specific employee subsets if different benefit accrual rates or required contribution rates apply with respect to those different subsets.

The term “annual remuneration” is not defined and it is therefore unclear whether the above thresholds must be met based on a particular workplace plan’s definition of pensionable earnings, or based on some broader definition (i.e. of taxable compensation). If annual remuneration is to be construed very broadly, then there may be workplace pension plans which

meet or exceed the stated DB benefit accrual rates or DC contribution rates, but fail to satisfy the above comparability thresholds because of a narrower definition of earnings.

As for the types of plans that will qualify as a “workplace pension plan,” the *ORPP Act, 2016* defines this term as a pension plan registered under the *Pension Benefits Act* (Ontario) (PBA) or under other substantially similar pension standards legislation in Canada, a pooled registered pension plan within the meaning of the *Pooled Registered Pension Plans Act, 2015* (Ontario), as well as pension plans regulated under the laws of a jurisdiction outside of Canada (i.e. foreign pension plans) that meet requirements to be established by regulation, and other prescribed pension plans.

The extension of the workplace pension plan definition to qualifying foreign plans as well as other prescribed pension plans is new, and details have not yet been disclosed as to the requirements that must be met to qualify such plans as a “workplace pension plan.” Employers who sponsor or participate in foreign and/or other types of pension plans on behalf of Ontario employees (including office holders) will want to closely monitor developments on this to determine the extent to which the “workplace pension plan” definition and possible comparability exemption might be extended to such plans.

2. Contributions & Funding

Consistent with earlier announcements, the target combined required contribution rate of 3.8% is enshrined in the *ORPP Act, 2016*. This rate is shared equally by employers and Ontario employees (i.e. the target employer contribution will be 1.9%).

The ORPP will be valued by an actuary every three years to determine whether the plan is funded on a sustainable basis. Contribution rates will be set with reference to a “Sustainability Rate.” The Sustainability Rate is roughly the contribution rate that is expected to permit the ORPP to pay its promised benefits for 100 years after the valuation date. If a valuation report shows that the ORPP is not funded on a sustainable basis, the ORPP Administration Corporation will be authorized to implement certain remedial measures affecting benefits and/or contribution rates. The *ORPP Act, 2016* requires that these funding sustainability measures be implemented in a staged approach, starting with certain reductions to benefits (i.e. indexation and the maximum earnings threshold). If it is determined that these initial benefit reduction measures are not sufficient, the ORPP Administration Corporation will be authorized to increase the combined contribution rate by up to 0.2% (i.e. up to 0.1% for employers).

Significantly, the *ORPP Act, 2016* contemplates additional contribution rate increases could be introduced if it is determined that the above remedial measures will not on their own result in the ORPP being funded on a sustainable basis.

The potential for the contribution rates to increase beyond a combined rate of 4% is a significant and new development that will be of particular interest to employers and their employees who are faced with the prospect of having to participate in the ORPP.

Contributions to the ORPP and related investment returns will be held in a trust that is separate from the ORPP Administration Corporation’s assets. The ORPP Administration Corporation will be required to manage the pension fund’s assets in the best interests of ORPP beneficiaries.

Leaves of Absence Under the *Employment Standards Act, 2000* (ESA)

Employees who participate in the ORPP can elect to contribute during leaves of absences that are protected under Part XIV of the ESA (i.e. pregnancy or parental leaves, amongst others). Employees will only accrue ORPP benefits for leave periods if they make contributions. The *ORPP Act, 2016* provides that the regulations may establish whether an election to contribute to the ORPP during any such leave must be made before or after a leave begins.

In general, an employer will be required to make employer contributions to the ORPP where an employee elects and makes the employee’s own contributions, but the *ORPP Act, 2016* contemplates that the employee will be responsible for both the

employee's and employer's contributions where an election to contribute respecting a leave is made at some, yet to be determined, point after the leave (on terms to be established by regulation).

Reimbursement of Overpayments

The *ORPP Act, 2016* authorizes the ORPP Administration Corporation to reimburse amounts remitted by an employer in respect of the employer's own ORPP contributions if amounts remitted exceed what the employer was required to remit or if the employer otherwise makes a payment in error. There is a similar provision for overpayments made by employees.

Related Employers

Where an ORPP member works for more than one employer within a corporate family, the regulations may provide that the related employers can take earnings from each other into account when determining the ORPP contribution obligations applicable to that member's employment with any one of the related employers. This would treat the related employers as a single employer for the purposes of calculating the maximum ORPP contribution for that member.

Successor Employers

When one employer immediately succeeds another as the employer of an employee as a result of the formation or dissolution of a corporation or acquisition, the successor employer may take into account the amounts paid, deducted, remitted or contributed by the former employer in respect of the ORPP for purposes of determining the successor employer's own obligations to pay, deduct, remit or contribute amounts in respect of the ORPP for that employee.

The *ORPP Act, 2016* also provides that a successor employer is jointly liable with the former employer to pay all amounts owing by the former employer immediately before the succession.

These successor employer rules are similar to comparable provisions of the *Canada Pension Plan.*

3. Benefits

The *ORPP Act, 2016* contains many of the benefit details outlined in the January 26, 2016 announcement. The benefit formula for a year in which the member contributes to the ORPP is 0.375% multiplied by the member's pensionable earnings in each year, with earnings adjusted in accordance with the regulations.

Beginning of Pension

The earliest day a member can elect to receive a pension is when the member reaches age 60. The latest day a member can start to receive a pension is when the member reaches age 70.

A member cannot receive an ORPP pension if the member continues to be employed in a position for which ORPP contributions are required, unless the member reaches age 70.

An ORPP member who has commenced receipt of an ORPP pension may elect to suspend payment of the pension in order to resume making contributions to the ORPP. Once it resumes, the suspended pension will be adjusted in the manner to be specified in the regulations.

Payment

ORPP benefits will be paid in equal monthly instalments, provided that small amounts (below an amount to be prescribed by regulation) will be payable in a lump sum.[1]

If the member has a spouse and is not living separate and apart from that spouse on the day that the first instalment of payment is due, the spouse will be entitled to joint and survivor benefits at the death of the member unless the spouse waives that right. If the member does not have a spouse, the ORPP pension will be paid as a life pension guaranteed for 10 years. If the ORPP member dies before 10 years of payments are made, a lump sum will be paid to that member's designated beneficiary or estate. The value of the lump sum will be the present value of the remaining payments in the 10-year period.

Other provisions allow for payment of a lump sum when a member's life expectancy is shortened.

Division of Pension on Relationship Breakdown

Regulations will provide for the division and reallocation of contributions to the ORPP made by spouses when they separate. However, no division or reallocation will take place before January 1, 2022.

4. Enforcement, Penalties

The *ORPP Act, 2016* contains extensive enforcement provisions focused on employer remittances of contributions.

Interest will accrue on contributions an employer fails to remit to the ORPP Administration Corporation by specified deadlines.

Further, the ORPP Administration Corporation will be authorized to issue a certificate of default for unremitted contributions and file it with the Ontario Superior Court of Justice or the Small Claims Court, where it will become enforceable as an order of the court. The *ORPP Act, 2016* also provides for a statutory lien over the employer's property for the amount set out in the certificate.

The *ORPP Act, 2016* also creates a deemed trust for contributions deducted from an employee's pay and an employer's own contributions until they are remitted to the ORPP Administration Corporation.

To promote compliance, the ORPP Administration Corporation may impose an administrative penalty on an employer who fails to remit required contributions, who contravenes certain provisions of the Act, or who makes false statements, etc. The maximum administrative penalty is $10,000, but no penalty can be imposed if more than six (6) years have passed since the infraction occurred. The regulations are to set out additional details about the calculation of administrative penalties. Employers will be able to object to administrative penalties.

In certain specified circumstances, such as bankruptcy, and if certain conditions are met, a director of a corporation may be jointly and severally liable with the corporation for unremitted contributions and any interest or administrative penalties imposed for the failure to remit. A due diligence defence is available if the director can demonstrate that she met her standard of care, and there is a limitation period that prevents recovery action more than two (2) years after the director last ceased to be a director of that corporation.

The *ORPP Act, 2016* makes it an offence for an employer not to remit required contributions and keep required records. It is also an offence to make false statements, evade payments, destroy records, etc. Directors and officers of a corporation and persons acting in a similar capacity in an unincorporated association can also be guilty of an offence. The maximum fine is $100,000 on a first conviction and $200,000 for each subsequent conviction. A prosecution for an offence cannot be started later than six (6) years after the date on which the ORPP Administration Corporation becomes aware that the offence has occurred or is alleged to have occurred.

5. Implementation, Transition & Review

Transition and Contributions

The regulations will specify when employers and their employees will be required to start contributing to the ORPP. For large and medium employers, the *ORPP Act, 2016* states that contributions will not start before January 1, 2018. For small employers, contributions will not start before January 1, 2019. Small employers are defined as employers who are not large or medium employers, and while the *ORPP Act, 2016* does not define what constitutes a large or medium employer and does not set out the phase-in of contribution rates for these employer groups, or for employers who have provided a "workplace pension plan," it is expected that these matters will be set out in regulations at levels and subject to conditions that are consistent with prior government announcements.

Review of ORPP

Before January 1, 2025, the Minister of Finance will initiate a review and prepare a report with regard to the *ORPP Act, 2016*, regulations and text, as well as the *Ontario Retirement Pension Plan Administration Corporation Act, 2015* and regulations. It will inform the public when initiating this process.

The Ontario PBA Does Not Apply

The *ORPP Act, 2016* will amend the Ontario PBA so as to exempt the ORPP from being subject to provisions of the Ontario PBA.

6. Municipal Sector

In our February 9, 2016 *FTR Now*, we highlighted a technical issue respecting the *Ontario Municipal Retirement Employees' System Act, 2006* (*OMERS Act, 2006*) applicable to Ontario municipal sector employers. Specifically, the *OMERS Act, 2006,* provides that Ontario municipal sector employers cannot contribute to any pension plan except for OMERS and/or the CPP. The *ORPP Act, 2016* will amend the *OMERS Act, 2006* to allow an Ontario municipal sector employer to also contribute to the ORPP.

Concluding Remarks

With ORPP contributions set to commence January 1, 2018, the time for employers to prepare is now. Assessing if and how the *ORPP Act, 2016* would impact your organization is only the first step: determining what, if any, strategies can be effectively tailored to meet your organization's human resources and financial needs is of critical importance.

The *ORPP Act, 2016* is at the First Reading stage and could be amended before receiving Royal Assent and coming into force. Future supporting regulations will also provide additional details and information. We will continue to monitor the progress of this legislation and provide you with updates as they are available.

Should you have any questions regarding the ORPP or what mitigation strategies might be available to your organization, please contact your regular Hicks Morley lawyer.

Further Reading

If you would like to learn more about the ORPP, please consult our prior publications:

- Ontario Budget 2016 (February 29, 2016)
- ORPP Implementation Delayed to January 1, 2018 (February 17, 2016)
- Preparing the Municipal Sector for the Ontario Retirement Pension Plan (February 9, 2016)
- Ontario Government Announces Additional ORPP Design Details (January 28, 2016)
- 2015 Federal Election Update: ORPP or CPP – Which Will it be? (October 26, 2015)

- ORPP: Ontario Government Announces Implementation Details (August 11, 2015)

[1] In general, ORPP benefits will not be payable prior to 2022.

The articles in this Client Update provide general information and should not be relied on as legal advice or opinion. This publication is copyrighted by Hicks Morley Hamilton Stewart Storie LLP and may not be photocopied or reproduced in any form, in whole or in part, without the express permission of Hicks Morley Hamilton Stewart Storie LLP. ©